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SUPREME COURT, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-557

JESSE SMITH,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**October Term, 1972**

No.

JESSE SMITH,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The petitioner Jesse Smith prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 13, 1972.

### A. The Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit in this case has been reported in F.2d (1972), and is set forth in Appendix A to this petition.

## B. Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 13, 1972, affirming the judgment of conviction of the United States District Court for the Eastern District of New York, entered April 14, 1972. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code, and Rule 19 of the Rules of this Court, to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit.

## C. Questions Presented

A federal criminal statute imposes punishment on anyone who participates or conspires in the use of extortionate means in the collection of an extension of credit. The extension of credit and two explicit threats,—the only threats alleged and proved,—were both made prior to the effective date of the statute. After the effective date of the statute, the only activity alleged and proved was the collection of money from the borrower by one designee of the lenders without threats of any nature.

I. Does federal criminal conspiracy law permit imposition of criminal liability upon one whose conduct pre-dates enactment of the substantive criminal statute alleged to have been violated?

II. Does conviction of petitioner for conspiring to violate the statute, where the evidence against petitioner relates solely to pre-enactment conduct, violate the *ex post facto* provisions of Article I, Section 9, Clause 3, and the Due Process provision of Amendment V, United States Constitution?

III. In light of the decisions of this Court in *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968), and *Haynes* v. *United States*, 390 U.S. 85 (1968), do the lower court rulings requiring petitioner to offer affirmative proof of withdrawal from a conspiracy not federally cognizable at its inception or during his participation violate the privilege against self-incrimination which is secured petitioner by Amendment V, United States Constitution?

IV. In assessing sufficiency of the evidence, is the trial court limited to post-enactment conduct of petitioner, or may it determine sufficiency solely on petitioner's pre-enactment conduct?

## D. Constitutional Provisions and Statutes

The Constitutional Provisions and Statutes involved are:

1. Article I, Section 9, Clause 3, United States Constitution
2. Amendment V, United States Constitution
3. Section 894, Title 18, United States Code

## E. Summary Statement

Petitioner Jesse Smith and two others, Rocco Lauria and Vincent Carvelli, were indicted for conspiring to violate Section 894 of Title 18, United States Code, and for eight separate substantive violations of the same statute. Upon a waiver of trial by jury and a stipulation permitting the trial court to decide the case upon the evidence which the Government represented it had available,[1] the district court

[1] Petitioner proposed the procedure permitting the district court to determine the legal issues involved upon stipulated facts in order to tender these legal issues to the courts on the clearest possible record. The defendant Carvelli entered a plea of "Guilty" to the count charging conspiracy to violate Section 894 of Title 18, United States Code, in advance of submission of the stipulated record to the district court.

dismissed the eight substantive charges contained in the indictment, determining that conviction on those counts would violate the constitutional proscription against *ex post facto* laws, Article I, Section 9, Clause 3, United States Constitution, and the due process guarantees of Amendment V, United States Constitution. The district court, however, found petitioner guilty of conspiring to violate Section 894 of Title 18, United States Code, and entered judgment sentencing petitioner to a term of imprisonment of three (3) years.

In February, 1968, petitioner and Lauria agreed to lend Howard Wallace Clyde the sum of Two Thousand ($2,000) Dollars under terms requiring repayment of the loan at the rate of One Hundred Fifty ($150) Dollars weekly, one-third of which was repayment of principal and two-thirds of which was interest. Intermittent payments were made to Carvelli, designated by Lauria, and another man, designated by petitioner, and when payments lapsed for several weeks, petitioner, Lauria and Carvelli visited Clyde and threatened property damage to both his residence and his place of business. Resumption of weekly payments was again interrupted thereafter, leading to further threats by petitioner and Lauria, these involving physical harm to the borrower's son, voiced to the borrower's wife on May 8, 1968. Weekly payments were made thereafter to Carvelli, without further threats, explicit or implicit, by anyone, for the remainder of the month of May, 1968, the month of June, 1968, and the first three weeks of July, 1968.

Subsequent to April 10, 1968, and May 8, 1968, the dates when the threats were voiced by petitioner, Lauria and Carvelli, on May 29, 1968, the Consumer Credit Protection Act, 82 Stat. 159, 18 U.S.C. §§ 891 *et seq.*, took effect. Sec-

tion 894 of Title 18, United States Code, the statute upon which the judgment below is predicated and which is a part of the Consumer Credit Protection Act, provides that:

> "[w]hoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means . . . to collect or attempt to collect any extension of credit"

is guilty of a federal crime.

## F. Reasons for Granting the Writ

The record here poses novel, serious and perplexing questions concerning the expansion of criminal liability through use of conspiracy statutes, and with respect to application of the *ex post facto* provisions of Article I, Section 9, Clause 3, and the due process and self-incrimination clauses of Amendment V, of the United States Constitution, to criminal conspiracy prosecutions. This Court has not had occasion within recent years to further define and refine the parameters of the *ex post facto* proscription and has never articulated the boundaries of that constitutional provision as applied to the criminal conspiracy prosecution, and the absence of such definition has caused the confusion and mischief implicit in the decisions of the courts below.

Thus, at the threshold the brief record here poses the fundamental question in criminal conspiracy prosecutions: Can conduct innocent when performed be made criminal by the enactment of substantive penal legislation with built-in conspiracy provisions? The district court's response to this threshold question was that

> "[t]he evidence conclusively establishes that the defendants did conspire to use extortionate means to

> collect an extension of credit *prior to the effective date* of [the statute]."

Citing inappropriate decisions which were concerned solely with continuation of a conspiracy which was criminal when formed but as to which an enhanced punishment statute was enacted during its existence, the district court concluded that

> "[t]he concept of conspiracy is that of a continuing crime . . . presumed to continue"

and convicted petitioner of the conspiracy. The appellate court considered this threshold question somewhat differently, concluding that

> "[t]he distinction between the agreement giving rise to the [conspiratorial] enterprise and the conspiracy which ensues and is continuous until the criminal purpose has been achieved is well understood." App. A at 7a.

The appellate court thus determined that while the agreement forming the conspiracy occurred when innocent "the conspiracy . . . is continuous until the criminal purpose has been achieved." Both decisions, premised on settled but inappropriate concepts of conspiracy, beg the threshold question which this Court has never delineated: Can criminal liability attach to concerted conduct innocent when performed by subsequent enactment of a conspiracy statute, absent post-enactment reaffirmation or ratification?

Assuming this Court responds to the threshold question in the affirmative, the ensuing inquiry concerns direct application of the *ex post facto* provisions of Article I, Section 9, Clause 3, of the United States Constitution, to the conspiracy concepts.

Assuming, for example, that this Court determines that, conceptually, federal criminal law permits conspiracy liability to attach where the evidence of pre-enactment conduct establishes concerted action to accomplish a result not criminal at that time, with the subsequent enactment of legislation making such conduct criminal, would not such a result violate Article I, Section 9, Clause 3, of the United States Constitution, which proscribes application of a

> "law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action." *Calder* v. *Bull*, 1 U.S. 269, 273 (1798).

This question, never considered by this Court in the context of criminal conspiracy prosecutions, is most appropriate for determination, particularly in light of the increasing reliance on conspiracy concepts in criminal prosecutions and the proliferation of federal penal statutes with conspiracy provisions.

Passing these two significant questions posed by the terse record of this prosecution, if both questions are answered in the affirmative, in a line of cases recently determined by this Court, it was held that where federal legal requirements are directed "almost exclusively to individuals inherently suspect of criminal activities", *Grosso* v. *United States*, 390 U.S. 62, 68 (1968), and where in "satisfaction of his legal obligation", *Haynes* v. *United States*, 390 U.S. 85, 95 (1968), the person is "confronted by substantial hazards of self-incrimination", *Marchetti* v. *United States*, 390 U.S. 39, 61 (1968), the person "may not be criminally punished for failure to comply". *Ibid.*

Here, both the trial and appellate courts answered the first two questions in the affirmative, and the trial court concluded that it was incumbent upon the petitioner "to establish by affirmative proof his withdrawal from the conspiracy" virtually simultaneously with the effective date of the statute. Imposition of such an obligation upon the petitioner, in light of N.Y. Penal Law §§ 155.05(2)(e) and 190.40 (McKinney 1967) which makes criminal under state law the conduct which the lower courts required petitioner to disaffirm, would indeed have confronted petitioner with "substantial hazards of self-incrimination". Thus, the record herein fairly calls into question the application of the shop-worn rule that affirmative proof of withdrawal from a conspiracy is required where, as here, the conduct is violative of state law when done and is only made criminal under federal law subsequent to the initial concerted action and absent post-enactment conduct.

Finally, and assuming this Court answers all three questions heretofore posed in the affirmative, there is yet a fourth inquiry which the appellate court said was "the crux of the matter." Was the trial judge correct in determining that there was sufficient proof . . . that there was a criminal conspiracy in violation of § 894 in effect on May 29, 1968 which continued from that date". App. A at p. 13a. Both the trial and appellate courts answered this question in the affirmative, but the manner of their response and the sparse record in this case fairly presents the question whether sufficiency of the evidence may be determined *solely* from post-enactment conduct, which the pre-enactment conduct can concededly illuminate, or may sufficiency of the evidence be determined by both pre-enactment and post-enactment conduct?

In affirming the judgment of conviction, the appellate court placed reliance on *United States* v. *Annoreno*, 460 F.2d 1303 (7th Cir., 1972), but a careful review of that decision indicates that there, unlike here, there was abundant evidence of post-enactment concerted action, making the pre-enactment conduct admissible for illumination purposes. However, in *Annoreno, supra* at 1308, Note 5, the appellate court approved the district court's instructions to the jury that the Government must prove that

> "[t]his alleged conspiracy was in existence after May 29, 1968. If you find that the alleged conspiracy was in existence after May 29, 1968, then [and only then] you may consider as evidence of that alleged conspiracy acts, conversations, and declarations made before May 29, 1968. . . ."

Implicit in this approved instruction is the conclusion that sufficiency of the evidence must be tested by post-enactment conduct, but neither the court below nor the court in *Annoreno, supra*, determined this issue which is fairly presented by the record here.

Thus, the record below, which has been honed to the essentials only, tenders perplexing questions concerning concepts of criminal conspiracy liability and the inter-relationship of the *ex post facto* and self-incrimination provisions of Article I, Section 9, Clause 3, and the due process provision of Amendment V, United States Constitution, which are ripe for resolution by this Court.

## CONCLUSION

**For the reasons hereinabove set forth, this petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

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## APPENDIX A

### Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 861, 872—September Term, 1971.

(Argued June 9, 1972 Decided July 13, 1972.)

Docket Nos. 72-1405, 72-1515

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—against—

JESSE SMITH and ROCCO LAURIA,

*Defendants-Appellants.*

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Before:

FRIENDLY, *Chief Judge,*
LUMBARD and MULLIGAN, *Circuit Judges.*

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Appeals from judgments of conviction after a non-jury trial in United States District Court for the Eastern District of New York, Anthony J. Travia, *Judge*, finding appellants guilty of conspiracy to collect an extension of credit by extortionate means in violation of 18 U.S.C. § 894.

Affirmed.

*Appendix A—Opinion of the United States Court of Appeals*

EUGENE M. PROPPER, Washington, D.C. (Robert A. Morse, United States Attorney for the Eastern District of New York, Richard L. Shanley, Special Attorney, Department of Justice, Roger Pauley, Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellee.*

JONATHAN L. ROSNER, New York, New York, *for Appellant Smith.*

MARVIN ZEVIN, Mineola, New York (Bracken & Sutter, Mineola, N.Y., on the Brief), *for Appellant Lauria.*

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MULLIGAN, *Circuit Judge:*

These are appeals from judgments of conviction entered in the United States District Court for the Eastern District of New York on April 5, 1972. Appellants Jesse Smith and Rocco Lauria were convicted of conspiring to use extortionate means to collect an extension of credit in violation of the federal loan sharking statute, 18 U.S.C. § 894,[1] and each was sentenced to three years imprison-

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[1] Title II of the Consumer Credit Protection Act, 82 Stat. 159, 18 U.S.C. §§ 891-96 (1968) proscribes three types of extortionate credit transactions: the making and financing of extortionate extensions of credit, 18 U.S.C. §§ 892-93 and the collection of extensions of credit by extortionate means, 18 U.S.C. § 894. We are here concerned with the latter transaction, and the statue provides in relevant part:

"§ 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

ment. The appellants waived their right to a jury trial and stipulated that the court could consider the statements of the government witnesses plus exhibits referred to in the statements as all of the evidence in the case as if the same had been presented in open court at a trial before the court sitting without a jury. The apparent reason for this procedure was that the defendants did not contest the facts but relied on the contention that the prosecution violated the *ex post facto* clause of the constitution (Art. I, § 9 cl. 3) and the due process provision of the fifth amendment. Judge Anthony J. Travia in his Findings of Fact and Conclusions of Law, *United States* v. *Carvelli*, 340 F.Supp. 1295 (E.D.N.Y. 1972), found the defendants guilty of the conspiracy count but dismissed the

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(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the non-repayment thereof was punished by extortionate means."

18 U.S.C. § 891 (7) defines as extortionate means as

". . . any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

The constitutionality of this statutory scheme has been upheld as within Congress' power under the Commerce Clause to control activities affecting interstate commerce. *Perez* v. *United States*, 402 U.S. 146 (1971).

eight substantive counts.[2] We affirm the judgments of conviction.

After Howard Clyde purchased an auto repair shop, he encountered serious financial problems and soon became the victim of a sordid loan sharking operation in October, 1967. He initially borrowed $1250 from Lauria whose collector was Carvelli.[3] The "vig" (vigorish or excessive interest) was $1000 with weekly payments scheduled to terminate in February, 1968. Clyde was still deeply in debt and in January, 1968 he was advised by one Lombardi, who initially acted as a collector for appellant Smith, that a $2000 loan might be possible if Smith was agreeable. Carvelli was disturbed by the prospect of losing this business, and the problem was solved by Carvelli providing Clyde with $2000 with Lauria and Smith each providing a $1000 investment. The terms of this deal were that the hapless Clyde was to pay back $6000 over a 40 week period so that the "vig" was a mere $4000. Carvelli gradually emerged as the sole collector for both Lauria and Smith, visiting Clyde's shop every week in February and March of 1968 accompanied by either one of the appellants. On April 10, 1968 Smith and Lauria accompanied Carvelli to Clyde's shop, and Lauria claimed that he was still owed

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[2] The indictment filed October 22, 1969 charged appellants with eight substantive violations of the statute alleging that on the eight post-enactment meetings between Carvelli and Mrs. Clyde (described above) the appellants "explicitly threatened" the Clydes. Judge Travia dismissed these counts on the ground that there was no evidence in the record of explicit threats on these occasions.

[3] Vincent Carvelli pled guilty to the conspiracy charge on January 11, 1972 and was sentenced to three years probation and fined $500.

an installment on his half of the loan. Both Lauria and Smith threatened at this time to burn down Clyde's shop as well as his home if he didn't pay. The appellants further stated that Carvelli was to collect all future payments in cash. Mrs. Clyde came into the shop and was menaced by Lauria. Clyde at this point was financially desperate. He was forced to sell his shop and find other employment which he sought to hide from the appellants.

On May 8, 1968 Lauria and Smith came to Clyde's home in his absence and told Mrs. Clyde, "We intend to collect our money." Smith commented that he knew where Clyde was working and where the children were attending school. Smith, noticing that the Clyde's four year old child had a bandaged arm, remarked, "It would be bad if something of this sort happened to his face." The Clydes were now in utter fear and determined to continue the payments at all costs. However, Carvelli was asked never to come to the house, and an arrangement was made to make future payments at a local cocktail lounge where Carvelli was employed.

Up to this point, no matter how revolting and repugnant the conduct of the appellants and even though criminal under state law,[4] it was not violative of any federal law. The Consumer Credit Protection Act did not become effective until May 29, 1968. In view therefore of the *ex post facto* problem it becomes crucial to examine the events which transpired after the effective date of the statute.

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[4] See N.Y. Penal Law §§ 155.05(2)(e) & 190.40 (McKinney 1967). It should be noted that 18 U.S.C. § 896 specifically provides that the federal statute was not intended to preempt any state laws proscribing like conduct.

On or about May 30, June 6, June 13, June 20, June 27, July 3, July 10 and July 17, 1968, Mrs. Clyde made cash payments to Carvelli at the Cadillac Lounge in Smithtown, New York. Mrs. Clyde was usually accompanied by a friend because of her nervousness and apprehension.

Before the end of the school year the Clydes sent their children to reside with out-of-state relatives. In late July, 1968 the Clydes fled from their home in the middle of the night to escape further payments and possible harm.

Carvelli turned over his weekly cash collections to either Smith or Lauria, whoever came to his bar first. Smith complained about not getting his full share, and both Smith and Lauria separately advised Carvelli that they would have to get together to straighten the matter out. In the summer of 1968, after the Clydes had fled from their home, Smith stated to Carvelli, "I got left holding the bag."

The principal contention of the appellants here is that since the agreement between Smith and Lauria with Clyde as well as the actual threats made by them against the Clydes, all predated the effective date of the statute and hence were federally "innocent", their post-statutory behavior was insufficient to establish a conspiracy to violate 18 U.S.C. § 894. We cannot agree.

The contention that the agreement by Lauria and Smith to make loans at usurious rates was entered into prior to the effective date of the statute while true, is not pertinent. The appellants were not charged or convicted of entering into an illicit agreement but rather of conspiring to collect extensions of credit by extortionate means. Mr. Justice Holmes a long time ago distinguished between the transitory character of an agreement and the continuous nature

of the conspiracy which follows. In differentiating between a contract in restraint of trade and a conspiracy in restraint of trade, he pointed out, "A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes." *United States* v. *Kissel*, 218 U.S. 601, 608 (1910). The distinction between the agreement giving rise to the enterprise and the conspiracy which ensues and is continuous until the criminal purpose has been achieved is well understood. *Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946); *Hyde* v. *United States*, 225 U.S. 347, 369 (1912); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 926 (1959).

It is well established that evidence of the prestatutory behavior of the conspirators even though innocent is admissible. In *United States* v. *Ferrara*, — F.2d — (2d Cir. April 7, 1972) slip op. at 2577 this court considered an appeal from a conviction of a conspiracy to violate a 1959 Taft-Hartley Act amendment, 29 U.S.C. § 186. The court held,

> "Furthermore, the trial judge did not commit reversible error in admitting evidence relating to the period before the statute was amended. Such evidence was admissible to show the existence and purpose of the conspiracy, as well as to prove the intent and purpose of the conspirators' later acts. In view of the fact that the conspiracy continued long after

> 1959, evidence of prior acts was both admissible and necessary to enable the trial judge to appreciate fully the reasons for the payments made after 1959." Id. at 2588.

Accord, *United States* v. *Binder*, 453 F.2d 805, 808 (2d Cir. 1971), *cert. denied*, — U.S. — 40 U.S.L.W. 3597 (U.S. June 20, 1972); *United States* v. *Russo*, 442 F.2d 498, 501 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972).

Appellant seeks to escape the force of *Ferrara* and comparable holdings by urging that the pre-statutory behavior held admissible in those cases did violate some federal criminal statute which was later amended and under which defendants were indicted. They assert in effect that the partnership innocent *in limine* cannot become subsequently tainted. This argument finds no support in logic or authority. None of the cases permitting the court to consider the pre-enactment behavior of the conspirators, was based on the fact that it was violative of some other federal statute at the time. The reason it was admitted was to assist the trier of the fact to determine the existence and purpose of the conspiracy and to illumine the intent and purpose of the post-enactment behavior. The defendants are not being punished for such pre-statutory behavior, in any event, so that no *ex post facto* problem arises.

The pre-enactment behavior here was hardly innocent; it was *malum in se* and violated state law. *Nyquist* v. *United States*, 2 F.2d 504 (6th Cir. 1924), *cert. denied*, 267 U.S. 606 (1925) is closely in point. The defendants there were charged with conspiring to violate the National Motor Vehicle Theft Act (Dyer Act) which became effective on October 29, 1919. There was no federal legislation at

all in this area prior to this enactment. In rejecting the argument that pre-enactment evidence violated the *ex post facto* doctrine the court said:

> "It was permissible to show that the fraudulent agreement was entered upon long before the Dyer Act took effect, and was kept up after the passage of that act. . . . The conspiracy charged was not only morally wrong, but was presumably punishable under state statutes previous to the Dyer Act; and if after that act took effect the parties to the conspiracy not only did not withdraw from it, but consciously continued in its prosecution, . . ., the parties thereto would be as guilty as if the conspiracy was first formed on or after October 29, 1919." Id. at 505 (citations omitted).

The most recent case in point involving the very statute at issue here is to the same effect. *United States* v. *Marchesani*, — F.2d — (6th Cir. April 5, 1972) Nos. 71-1620 and 71-1621.

The appellants further urge that their convictions should be reversed because there is no evidence they made any threats to the person or property of the Clydes after May 29, 1968, the effective date of the statute. The gravamen of the § 894 offense, the argument runs, is the use of extortionate means in the course of loan collections, and since there is no proof in this case of any threats since the April and early May incidents, they are, in effect, being punished for threats made prior to the time it was illegal to do so. Once again we find the argument to be without merit.

The case upon which appellants place major reliance for the proposition that the use of extortionate means repre-

sents the corpus delicti is *United States* v. *Biancofiori*, 422 F.2d 584 (7th Cir.), *cert. denied*, 398 U.S. 942 (1970). We do not quarrel with the proposition at all but point out that in that case the defendant was charged with the completed crime under § 894 and not the conspiracy to violate § 894 which is also made criminal by that section. The distinction between the use of extortionate means (the completed crime) and the conscious planning and conniving in partnership to employ such means (the inchoate crime of conspiracy) is basic. See *Carbo* v. *United States*, 314 F.2d 718, 740-41 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

Appellants urge however that in this case the indictment set forth three post-enactment overt acts (the collections on June 6, June 13 and July 10, 1968) no one of which was shown to have been accomplished by the use of any actual or explicit extortionate means. There are several answers to the suggestion that this constitutes a basis for reversal.

In the first place, this was not an indictment under the general conspiracy section, 18 U.S.C. § 371, which requires the proof of overt acts in a prosecution under that section. This was an indictment under 18 U.S.C. § 894 which provides both for the completed crime as well as the conspiracy, and under such a statute there is no necessity to set forth overt acts in the indictment. *Singer* v. *United States*, 323 U.S. 338, 340 (1945); *United States* v. *Tolub*, 187 F. Supp. 705, 709 (S.D.N.Y. 1960), *aff'd*, 309 F.2d 286 (2d Cir. 1962). That overt acts were unnecessarily pleaded here does not add to appellants argument, since the function of the overt act in a conspiracy indictment and trial is simply

to manifest that the conspiracy is at work. The overt act pleaded need not even be criminal. *Yates* v. *United States*, 354 U.S. 298, 334 (1957). The court, in any event, is not limited in its examination of post-enactment conduct to that set forth in the indictment in determining whether appellants adhered to their initial agreement. See *United States* v. *Armone*, 363 F.2d 385, 400-01 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966).

We refuse to read Section 894 as requiring that each collection be accompanied by an overt threat.[5] We have already established that the pre-enactment conduct of the conspirators is admissible to explain the intent and purpose of their subsequent behavior. Here there were unquestioned brutal threats made upon Clyde, his family and his property. They were made to effectuate their re-payment of a loan which required weekly collections well after the statute was effective. We think that the evidence abundantly establishes that the June and July payments were prompted by the April and May threats and that certainly this is all the statute requires for a conspiracy violation.

That the statute embraces post-enactment actions motivated by a pre-enactment threat which remains efficacious was recently the holding of *United States* v. *Annoreno*, —— F.2d —— (7th Cir. May 26, 1972) No. 71-1233, which

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[5] The serious concern of Congress with the national problem of loan sharking is evidenced by the broad definition of "extortionate means" in 18 U.S.C. § 891 (7) which includes the use of "implicit threats", and 18 U.S.C. § 894(b) permits proof of implicit threats by evidence of the creditors past collection practices, known to the debtor. See *United States* v. *Marchesani*, —— F.2d —— (6th Cir. April 5, 1972) pointing out that evidence of extortionate means applied to others and made known to the victim may be introduced on trial.

dealt with a conspiracy to violate 18 U.S.C. § 892. The court states,

> "The relevance of the pre-May 29, 1968, transactions is readily apparent. The defendants were obviously engaged in a continuing course of conduct which began several years before the statute took effect and did not change afterward. In extending credit after the operative date of the statute, they necessarily relied upon and used the impressions created in the minds of potential borrowers by actions and utterances which occurred before the enactment of the statute. For example, borrowers who were threatened with physical violence in the event of non-payment of loans negotiated prior to enactment were certain to understand the extortionate nature of loans procured subsequent to enactment." Id. at ——.

The case before us is in fact stronger since the pre-enactment threats here related not to another transaction but to the very loan which extended into the post-enactment period. The latest were made only 21 days before the statute was enacted.[6]

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[6] This court was faced with an analogous situation when reviewing a conviction for a substantive violation of 18 U.S.C. § 1951 (extortion) where the only threat was made in 1952 and as to that the statute of limitations had run. Chief Judge Lumbard writing for the court stated, (*United States* v. *Tolub*, 309 F.2d 286, 289 (2d Cir. 1962)):

> "Admittedly the initial threat was made back in 1952, but the statute does not require a verbal threat. It requires only that defendant induce his victim to part with property through the use of fear . . . The jury is permitted to find such inducement by use of fear from testimony as to the state of mind of the victim." (citations omitted).

Thus we finally arrive at the crux of the matter—was the trial judge correct in determining that there was sufficient proof beyond a reasonable doubt that there was a criminal conspiracy in violation of § 894 in effect on May 29, 1968 which continued from that date until it was frustrated by the flight of the Clydes in late July, 1968. There is no doubt in our minds that this proposition was clearly established.

The initial agreement and burgeoning partnership to extort the collection of the loan and vigorish are not left to the inferences which becloud the search in other conspiracy cases. Chief Judge Friendly in *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965) commented upon the difficulty in determining what agreement can be inferred in a narcotic conspiracy case even where there is a repeated pattern of purchases. No such problem is created by the loan sharking conspiracy. Once it is established, and it is not controverted here, that a $2000 loan was made in January, 1968 with vigorish computed at $4,000, with weekly installments of $150 to be made over a 40 week period to Carvelli, acting for Lauria and Smith, there is no difficulty in attributing the post-enactment payments to the initial arrangement which necessitated a continuing relationship. The subsequent collections cannot be viewed in isolation as separate or unrelated transactions. See *United States* v. *Kissel*, *supra*, 218 U.S. at 607.[7]

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[7] Appellant Lauria's contention that the post-statutory payments to defendants were not the result of the conspiracy but constituted "merely the routine execution of a bilateral agreement between Carvelli and Mrs. Clyde", which antedated the statute, is not only euphemistic but unrealistic. The third party "beneficiaries" of the bilateral contract suggested, continued to be Lauria and Smith.

The post-enactment transactions here demonstrate the continuing criminal partnership of Smith and Lauria who had designated Carvelli their collector. Eight payments of principal and vigorish were made with regularity by Mrs. Clyde at the cocktail lounge, as prearranged, from May 30 to July 17, 1968. Carvelli admitted turning over the money to either Smith or Lauria whoever appeared first at the bar. Smith complained about being shortchanged and each of the appellants separately advised Carvelli that they would have to get together to straighten the matter out. On learning that Clyde had fled, Smith lamented to Carvelli that he had been left "holding the bag." The same dirty game with the same cast and the same rules were being played after May 29th as before. The continuing use of the common collector, the sharing of the collections and the expressed desire of each conspirator to get together to straighten the matter out, can only be referable to a "continuous cooperation of the conspirators to keep it up", *United States* v. *Kissel*, *supra*, 218 U.S. at 607. There was "continuity of action" here sufficient to indicate that the conspiracy was continuous. *Fiswick* v. *United States*, 329 U.S. 211, 216 (1946). There is no suggestion of withdrawal by either, no abandonment of the venture, only the frustration caused by the flight of the Clydes.

There is no doubt but that the collections that were made in June and July were the result of fear and, in fact, terror. Mrs. Clyde was normally accompanied to the place of payment by a friend or neighbor and her fear was visible. When Carvelli was not present at the appointed time, Mrs. Clyde was forced by her husband to visit the

bar the next day lest harm come to them. Their removal of children from school before the term was ended and their own midnight flight from home all support the finding that the collections by Carvelli acting for Lauria and Smith were prompted by the continuing threat of harm made just weeks before.

Appellant Lauria's claim that his fifth amendment rights were violated by his being subpoenaed before the grand jury when he was a prospective defendant, is without merit and was properly disposed of below.

Convictions affirmed.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-557

JESSE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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After a jury-waived trial in the United States District Court for the Eastern District of New York, petitioner and one Rocco Lauria were convicted of having conspired to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894. Petitioner was sentenced to three years' imprisonment. The court of appeals affirmed in a lengthy opinion on July 13, 1972 (Pet. App. A). The petition for a writ of certio-

rari was not filed until October 6, 1972, and is therefore almost two months out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

Petitioner contends that his conviction violated the *ex post facto* clause of the Constitution because, he alleges, the conspiracy commenced before the effective date of the statute and did not continue thereafter.[1] This claim is fully analyzed and properly rejected in the opinion below, on which we rely. Petitioner also asserts, citing *Grosso* v. *United States,* 390 U.S. 62, *Haynes* v. *United States,* 390 U.S. 85, and *Marchetti* v. *United States,* 390 U.S. 39, that requiring him affirmatively to show his withdrawal from the conspiracy would violate his rights against self-incrimination. Petitioner did not raise this claim in the court of appeals and he should not be permitted to raise it for the first time in this Court. *Lawn* v. *United States,* 335 U.S. 339, 362, n. 16; *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147, n. 2. Moreover, he does not even discuss it in the petition, except for raising it as a "question presented." In any event, there is no merit to the contention. Had he wished to withdraw, petitioner had no affirmative duty to disclose any information to the authorities; he could have withdrawn simply by telling the victim of the extortion that he would no longer have to pay. To the extent he may be focusing on the practical need to testify at trial in order to present a basis

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[1] Co-defendant Lauria has filed a separate petition for a writ of certiorari raising the same issue (No. 72-409).

for an affirmative defense, there is clearly no compelled incrimination in the constitutional sense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

NOVEMBER 1972.

☆ U.S. Government Printing Office: 1972—489-455/326